IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4788 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

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4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

RAFIQ @ GAE GANIBHAI SHEIKH -- Petitioner

Versus

POLICE COMMISSIONER -- Respondents

and two others

Appearance:

MR VM DHOTRE for Petitioner

Mr.S.P.Dave, learned A.G.P.

for Respondent Nos. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 24/11/97

ORAL JUDGEMENT

1. The petitioner, who has been detained pursuant to the order of detention, has challenged the constitutionality and validity of the order dated 4.5.97 passed by the Police Commissioner of the City of Vadodara, invoking the powers under S.3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as 'the Act') so as to deter the petitioner from further committing the wrongs adversely affecting the maintenance of public order.

2. The facts which led the petitioner to prefer this petition under Article 226 of the Constitution of India may be stated. Against the petitioner in the Sayajigunj Police Station and Karelibaug Police Station four complaints came to be lodged. In the Sayajigunj Police Station, two complaints regarding the offence punishable under S.379 I.P.C. were lodged, while with the Karelibaug Police Station, two complaints for the offences punishable under Sections 392,452 read with 114 I.P.C. came to be lodged. The Commissioner of Police, having come to know about the said complaints, thought it fit to have a detailed investigation, during the course of which he could notice that the petitioner was a high handed person. He was forming unlawful assembly, carrying out his anti social activities either using the lethal weapons and causing injuries to the innocent persons or by giving threats, extorting money from the shop keepers and resorting to frequent scuffles. Because of his such activities known to the public, whenever the section of the public knew that he is approaching from either of the directions, people used to chevy because they were apprehending danger at any time, and anywhere, endangering their safety. The people, worrying about their safety were unwilling to come out and lodge the complaint or make statement against him. The detaining authority recorded the statements of some persons. He found that to curb the anti social-activities of the petitioner breeding anarchy, the provisions of the general law were sounding dull and the only way out to curb his activities was to pass the detention order under the Act and detain the petitioner. He, therefore, passed the impugned order pursuant to which the petitioner came to be detained.

3. On several grounds the learned advocate representing the petitioner has assailed the impugned order, but I do not think it necessary to dwell upon all those grounds because on one ground, going to the root of the case, the whole of the petition can well be disposed of. I will, therefore, confine to the only ground, and

it is qua exercise of privilege under S.9(2) of the Act about non disclosure of certain particulars of the witnesses so that the detenu - petitioner may not identify those witnesses and retaliate.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference, namely, not to disclose the certain facts,but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act the detaining authority is empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such Constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether disclosure of any facts involved there is against public interest or both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. No doubt he can entrust the task of

inquiry to any one else found fit for the purpose,but in that case also he has to take decision only after application of mind to all the facts and circumstances on record. If he mechanically endorses or accepts the recommendation of an outsider or inferior authority in that behalf the exercise of power would be vitiated as arbitrary. What is further required is the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bona fide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal mala fide. For my such view, a reference to a decision in the case of Bai Amina, w/o Ibrahim Abdul Rahim Alla v. State of Gujarat and others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this court in the case of Chandrakant N. Patel v. State of Gujarat & Others, 35(1) (1994 (i)) G.L.R. 761 may be made.

5. In view of the settled law, the authority passing the order has to satisfy himself considering all the relevant materials and aspects. If he mechanically accepts the statements recorded by his subordinate without applying the mind or personally verifying the facts about the fear apprehended by the witnesses, considering the contemporaneous evidence and materials it would not amount to personal satisfaction, as application of mind will be lacking which is the requirement of S.9(2) of the Act. No doubt, the authority passing the order has filed the affidavit, to show that there was application of mind which is at page 13, but it can not be said on the basis of the affidavit that he was personally satisfied by applying the mind for the exercise of the privilege and deemed it fit to withhold the particulars so as not to disclose the identity of the witnesses. He has in para 6 made it clear that he had instructed his Assistant Commissioner, 'C' Division to verify the statements recorded by the Sponsoring Authority. After going through the verified statements and considering the said statements, he was satisfied that the apprehension of the witnesses about the fear of violence if their identity was made known was well founded. In my view, this satisfaction is nothing but a

mechanical satisfaction. When the Authority is silent in his affidavit as to what other evidence or material he considered for reaching the above conclusion, the fact that he was satisfied must be held to be a mechanical satisfaction and not a satisfaction by application of mind. When the requirements for the exercise of privilege are wanting as per the law made clear herein-above, the privilege exercised cannot be termed just. Consequently, non-disclosure marring the right of the petitioner to make effective representation is fatal to the opponent.

6. Faced with such a situation, the learned A.G.P. Mr.S.P.Dave drawing my attention to a case of Mohmad Sarif v. Commissioner of Police, reported in 1997(1) GLH 1017 has submitted that the high officer, having high calibre and integrity, assigned with the task by the authority records the statements and makes a report forming certain opinion and his report is accepted by the authority passing the order of detention, it will satisfy the requirements of S.9(2) of the Act. In that case exercise of the privilege, will certainly be in consonance with the requirements of law. This contention can not be accepted. As per the law made clear hereinabove, the authority passing the detention order has to be personally satisfied for the exercise of the privilege, by application of mind even if he has deputed the officer of high calibre and integrity for recording the statements and making report. The report made and apprehension expressed by the witnesses are just, and well based and not hollow or banal or trite must considering other materials be determined by the authority. In the decision cited by learned AGP it is made clear that in such matters when the life and liberty of the citizens are put to jeopardy without trial and the detention orders are passed, the approach of the Court at no stage should be casual. But the court must be, in my view, very touchy qua dissatisfaction of the requirements of law. What is further held in that case is that after the receipt of the statements recorded through the subordinate officer, the Authority passing the order has to apply the mind and consider other contemporaneous evidence, on the basis of which the opinion has not only to be formed, but in the body of the order, it must also appear that the Authority had applied the mind. Mere reproduction of the statements in the body of the order is not sufficient. In the case on hand, it is not made clear in the affidavit filed by the Authority, passing the order, what other facts and material he considered while appreciating the danger expressed by the witnesses in their statements. The witnesses were also not called

and interviewed. It seems, simply he accepted what was reported and stated by the witnesses, and, therefore, his satisfaction, even if there be any, must be held to be the satisfaction without application of mind, and due ascertainment about the entity of witnesses. The requirements of law are not satisfied. When that is the case, the privilege exercised cannot be held to be just and proper and concealment of particulars cannot be said to be necessary in the public interest. The decision of Mohmad Sarif v. Commissioner of Police (Supra), on which the learned A.G.P. relies upon, can not, for these reasons, help him. It seems learned AGP has misread the same.

7. In view of such facts, it was incumbent upon the Police Commissioner of the Vadodara City to give particulars of the witnesses so that the petitioner could make effective representation. When such particulars were not supplied, the petitioner was deprived of his right to make effective representation and, therefore, the order of detention being unconstitutional and illegal, cannot be maintained. Consequently, the detention order dated 4.5.97 is quashed and the petitioner is ordered to be set at liberty forthwith, if no longer required for any other case. Rule is made absolute. Direct service is permitted.

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